No. ___

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,
Petitioner,

v.

ARTURO R. RECUENCO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A single element missing or misdefined in jury instructions can be harmless error if, beyond a reasonable doubt, the error did not contribute to the verdict. *Neder v. United States*, 527 U.S. 1 (1999). In contrast, errors that affect the entire framework within which a trial proceeds, rather than errors in the trial process itself, are "structural" and will always invalidate a conviction. *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

It is undisputed in this assault case that the only weapon used was a firearm, but the verdict form for the enhancement failed to distinguish a "firearm" finding from a more generic "deadly weapon" finding—the "firearm" finding carries a greater sentence.

The question presented here is whether error as to the definition of a sentencing enhancement should be subject to harmless error analysis where it is shown beyond a reasonable doubt that the error did not contribute to the verdict on the enhancement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

MISCELLANEOUS

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The King County Prosecuting Attorney, on behalf of the people of the State of Washington, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Washington in this case.

OPINION BELOW

The opinion of the Washington Supreme Court is reported at *State v. Recuenco*, 154 Wash. 2d 156, 110 P.3d 188 (Apr. 14, 2005). App. A (1a-8a)[1]. The Court of Appeals decision in this case is unpublished, 117 Wash. App. 1079, 2003 WL 21738927, Wash. App. Div. 1, Jul 28, 2003, and is reproduced in the appendix to this petition. App. B (9a-19a).

[1] "App." refers to the Appendix to this Petition For A Writ Of Certiorari.

JURISDICTION

The Washington Supreme Court's judgment was entered on April 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents a question under the Fifth and Fourteenth Amendments of the Federal Constitution.

STATEMENT OF THE CASE

A. The Crime.

The material facts of the crime are not disputed. Recuenco angrily accosted his wife in an argument and threatened her with a gun. Police were summoned, the gun was recovered immediately following the incident, and it was admitted as an exhibit at trial. Recuenco conceded that the gun was his and admitted that he held it in his hand just after the assault, but he denied pointing the gun at his wife to assault her. There was no evidence of any other weapon in the assault.

B. Charges, Instructions, and Verdict.

Recuenco was charged, inter alia, with assault in the second degree. The assault charge included a special deadly weapon allegation that would support an enhanced sentence if found by a jury. The charging document specifically alleged that the assault was committed with a deadly weapon, "to wit: a handgun." Under Washington law, a "firearm" finding carries a three-year enhanced sentence. If the jury finds, on the other hand, that the offender was armed with "a deadly weapon other than a firearm," a one-year sentence enhancement is imposed. Wash. Rev. Code § 9.94A.510(3)(b), (4)(b).

After all the evidence was received, the court conferred with counsel regarding jury instructions. With regard to the weapon instruction, the Court said, "Counsel, quite frankly

there is no dispute in this case that we are talking about a gun . . ." 8RP 797. Defense counsel did not dispute that observation. Counsel later commented that, "In this case, the allegation and the basis on which this case was tried was under the theory of firearm." 8RP 902. Counsel argued for a different definition of the term "firearm" than was provided by the court but he did not dispute that the weapon at issue was a gun. 8RP 798-99. In fact, defense counsel argued that the crime of "Aiming a Firearm" should be submitted as a lesser included offense instruction. 8RP 803-09.

The jury was instructed that to convict the defendant of the crime of assault in the second degree, the State must prove beyond a reasonable doubt that "on or about September 18, 1999, the defendant intentionally assaulted Amy Recuenco with a deadly weapon . . ." (Instruction No. 8). The court also instructed the jury that "[t]he term "deadly weapon" includes any firearm." (Instruction No. 9).

Regarding the special verdict that would trigger an enhanced sentence, the court instructed as follows:

> For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree as alleged in Count I.
>
> A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

(Instruction No. 18). The jury was instructed to return the special verdict form only if it was unanimous. (Instruction No. 20). Recuenco proposed an identical verdict form.

Arguments of the lawyers tracked these weapon instructions. The prosecutor's closing argument focussed on the defendant's use of a gun. 9RP 822-34. Likewise, defense counsel's closing argument repeatedly referred to the gun as the weapon alleged in the assault. *See, e.g.*, 9RP 838. The

jury found the defendant guilty of assault in the second degree, and returned the special verdict form finding that he was armed with a "deadly weapon" in the commission of assault in the second degree.

During the defendant's post-trial motion to vacate the jury verdict, defense counsel stated, ". . . Your Honor, the firearm is an element of this offense as it has been pleaded and argued to the jury and evidently, perhaps obviously, proven to the jury." 11RP 912-13. Even though there was no question that a firearm had been proved, counsel asked the court to impose a lesser deadly weapon enhancement rather than a firearm enhancement. The trial court rejected this request, and imposed sentence for use of a firearm.

C. Appellate Review.

Recuenco challenged the weapon finding on appeal. The Washington Court of Appeals, relying on *Neder v. United States*, 527 U.S. 1 (1999), held that any error in crafting the special verdict form was harmless beyond a reasonable doubt. App. B (17a-19a).

The Washington Supreme Court granted review and considered Recuenco's case together with three consolidated cases raising numerous issues pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004). *See State v. Hughes*, 154 Wash. 2d 118, 110 P.3d 192 (2005). (20a-27a) (Excerpt of harmless error portion of *Hughes*). The court's opinion in *Hughes* contains most of the analysis of the harmless error issue challenged in this petition. The *Recuenco* decision simply cites the analysis in *Hughes*.[2] App. A (8a)

In *Recuenco*, the court reversed the sentencing enhancement, finding that pursuant to *Blakely v. Washington*, 542

[2] Although a motion to reconsider is pending in *Hughes*, the motion does not challenge the harmless error holding, so that aspect of the opinion is final.

U.S. 296 (2004) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Recuenco's Sixth Amendment right to a jury verdict had been violated when the judge, not the jury, made the "firearm" determination.[3] App. A (5a-7a). The court applied its holding from *Hughes* that *Blakely*-type error was structural error, equivalent to the error in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), because the jury's failure to render a verdict on the "firearm" question meant that there was no "object" upon which to conduct harmless error analysis. *State v. Recuenco*, App. A (8a). *State v. Hughes*, App. C (22a-23a). The Washington Supreme Court thus concluded that harmless error review was impossible. It expressly distinguished *Neder*, holding that *Neder* did not apply to errors pursuant to *Blakely* or *Apprendi*. App. C (26a-27a).

Accordingly, the court in *Recuenco* reversed the "firearm" sentence and remanded for the ministerial act of imposing a shorter sentence using the generic "deadly weapon" enhancement. App. A (8a).

There was no state constitutional basis for this decision. In fact, prior to *Blakely* and *Apprendi*, the Washington Supreme Court repeatedly found harmless error where deadly weapon enhancements were misdefined, even where the burden of proof was misstated. *See, e.g., State v. Fowler*, 114 Wash. 2d 59, 785 P.2d 808 (1990). The *Recuenco* court's decision rested wholly on its belief that *Sullivan v. Louisiana* precluded harmless error analysis for Sixth Amendment sentencing error.

[3] The State argued that any error was invited by the defendant's proposed instructions but the Court rejected the invited error argument. That ruling rests on Washington law, presents no federal question, and thus is not challenged in this petition. Similarly, this petition does not present the myriad, and transitory, "plain error" questions now pending in the federal courts of appeal under Fed. R. Crim.P.52(b). *See United States v. Rodriguez*, 406 F.3d 1261 (11th Cir. 2005), *cert. denied*, ___ U.S. ___, 2005 WL 483174, 73 USLW 3531 (U.S. June 20, 2005) (No. 04-1148).

REASONS FOR GRANTING THE PETITION

This case is an excellent vehicle for resolving an important federal constitutional question under the Fifth and Fourteenth Amendments regarding the scope of harmless error analysis, *Chapman v. California*, 386 U.S. 18, 20-21 (1967), and upon which there is a conflict and substantial controversy. Supreme Court Rule 10(b), (c). The general criteria for granting certiorari of a state court case are met. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974); R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice*, 271-72 (8th ed. 2002).

First, the ability of an appellate court to find harmless error is analyzed in Washington under the Federal Constitution, *State v. Brown*, 147 Wash. 2d 330, 340-41, 58 P.3d 889 (2002), and is a substantial question under the Federal Constitution. Recent Washington Supreme Court decisions, as well as the recent decision from the North Carolina Supreme Court in *State v. Allen*, (2005 WL 1539186 at *11-17), ___ S.E.2d ___ (N.C. 2005), make it clear that these state courts believe *Sullivan v. Louisiana* precludes harmless error analysis on *Apprendi* and *Blakely* error.

Second, the Washington Supreme Court's decision conflicts with this Court's decisions, with federal appellate courts' decisions, and with decisions of other state supreme courts. Review by writ of certiorari to a state supreme court is appropriate under such circumstances to determine whether the Washington Supreme Court "has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation." R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice*, at 273(j) (citing cases including *Bullington v. Missouri*, 451 U.S. 430, 431 (1981) (certiorari granted on issue whether reasoning of prior Court precedent also applies to different kind of sentencing hearing) and *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read Miranda too broadly")).

Third, there is disagreement in the federal and state courts over whether *Blakely* error is structural error that is subject to harmless error analysis, even outside the "plain error" context.

Finally, the mode of analysis used by the Washington Supreme Court will have continuing, not simply transitory, impact on harmless error analysis in any state with a mandatory sentencing guidelines structure under which aggravating factors are submitted to a jury. Under such a system, mistakes in instructing the jury on sentencing enhancements will occur, and courts need to know whether harmless error analysis is possible for such mistakes. In this way, the issue here is much different from the largely transitory post-*Booker*[4] "plain error" litigation that is currently sweeping the federal courts.

For these reasons, review by this Court is appropriate.

A. Conflict with This Court's Precedent.

The *Recuenco* decision conflicts with several decisions of this Court on an important question of federal constitutional law, resulting in an improper application of this Court's precedent.

Neder was a tax fraud prosecution wherein the jury was told that it did not need to find that a misstatement in a tax return was "material." Thus, the jury's verdict did not address this issue. Neder claimed that failure of the jury to render a verdict on this element violated his right to a jury trial, and was not subject to harmless error analysis.

This Court rejected Neder's arguments, reaffirming that "most constitutional errors can be harmless." *Neder*, 527 U.S. at 8 (citing *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991)). The Court held that misdefining or omitting an ele-

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[4] *United States v. Booker*, ___ U.S., ___, 125 S.Ct. 738 (2000).

ment of the crime could be harmless, and rejected comparisons to *Sullivan v. Louisiana*. In particular, the Court narrowly interpreted *Sullivan*, limiting its holding to situations wherein the jury's verdict was completely vitiated by error. *Neder*, 527 U.S. at 11. The Court rejected the argument that a missing or misdefined element created a "gap" that could never be filled by harmless error analysis. *Id.* at 13-14. ". . . [T]he absence of a 'complete verdict' on every element of the offense establishes no more than that an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee." *Id.* at 12. But that conclusion does not establish that harmless error is impossible.

This Court ultimately concluded that the facts in *Neder* clearly illustrated that a harmless mistake had occurred in trial of the case. Underreporting $5 million in income was obviously material, materiality was never in dispute at trial, so any error was harmless. *Neder*, at 15.

More recently, in *Mitchell v. Esparza*, 540 U.S. 12 (2003), harmless error analysis applied even in a capital case. Esparza was charged with capital murder committed during the course of a robbery. The charging document and jury instructions failed to allege that Esparza was the "principal offender"—a requirement for imposing the death penalty under Ohio law. Esparza argued on appeal that this error precluded imposition of the death penalty but Ohio courts found the error harmless. The Eighth Circuit Court of Appeals reversed, reasoning that "failure to charge in the indictment that respondent was a principal was the functional equivalent of 'dispensing with the reasonable doubt requirement'". . . (citing *Sullivan v. Louisiana*). *Esparza*, 540 U.S. at 16.

This Court reversed the Eighth Circuit in a per curiam opinion:

> . . . In noncapital cases, we have often held that the trial court's failure to instruct a jury on all of the statutory elements of an offense is subject to harmless-error analysis. *E.g., Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *California v. Roy*, 519 U.S. 2, 117 S.Ct. 337, 136 L.Ed.2d 266 (1996) *(per curiam); Carella v. California*, 491 U.S. 263, 266, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) *(per curiam); Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987). In *Neder*, for example, we held that such an error "differs markedly from the constitutional violations we have found to defy harmless-error review." 527 U.S., at 8, 119 S.Ct. 1827. In so holding, we explicitly distinguished *Sullivan* because the error in *Sullivan*—the failure to instruct the jury that the State must prove the elements of an offense beyond a reasonable doubt—"'vitiat[ed] *all* the jury's findings,'" 527 U.S., at 11, 119 S.Ct. 1827, whereas the trial court's failure to instruct the jury on one element of an offense did not, *see id.*, at 13-15, 119 S.Ct. 1827. Where the jury was precluded from determining only one element of an offense, we held that harmless-error review is feasible. *Ibid.*

Esparza, 540 U.S., at 16-17 (italics in original). This Court further held that, because Esparza was the sole participant alleged to have committed the robbery and murder, the Ohio court's harmless error determination was not unreasonable. *Esparza*, 540 U.S. at 18.

Thus, this Court's precedents clearly provide that harmless error analysis is appropriate even if the trial court completely omitted an element of the crime from a jury instruction or charging document. It is also clear that the broader language in *Sullivan v. Louisiana*, suggesting that any gap in the jury instructions could not be filled by a harmless error analysis, has been limited by *Neder*.

It follows that the error in the present case, failure to use a sufficiently precise special verdict form on the nature of a sentencing factor, should be subject to harmless error analysis. The weapon enhancement is a sentencing factor, not an

element of the crime. Although sentencing factors are the "functional equivalent" of elements for Sixth Amendment purposes,[5] they surely are not of *greater* significance than an element of the crime. Misdefining a sentencing enhancement no more vitiates the entire jury verdict than does omitting an element of the crime. Thus, it would be incongruous to permit harmless error analysis as to a missing element, but to prohibit such analysis as to a misdefined sentencing factor.

Recuenco (and *Hughes*) are simply inconsistent with *Neder*. It thus appears that the Washington Supreme Court has not "properly interpreted, applied, or extended a prior Supreme Court decision in a given situation." R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice*, at 273(j). Review should be granted to correct this conflict between this Court's precedents and the erroneous interpretation of the federal constitution by the Washington Supreme Court. Supreme Court Rule 10(c).

B. Conflict with the Circuit Courts of Appeal.

The Washington Supreme Court's analysis relies on a decision of the U.S. Court of Appeals for the Ninth Circuit—a decision that conflicts with decisions of all the other federal courts of appeal, illustrating the need for review by this Court.

The Washington Supreme Court relied upon *United States v. Jordan*, 291 F.3d 1091 (9th Cir. 2002), in holding that a Sixth Amendment sentencing error can never be harmless. *See State v. Hughes*, App. C (24a-25a). In *Jordan*, drug quantity was not proved to a jury beyond a reasonable doubt, yet Jordan's sentence was increased based on the quantity of drugs possessed. Accordingly, the Ninth Circuit found a Sixth Amendment violation. Because the error was preserved at sentencing, it was to be reviewed for "harmless error" rather than "plain error." *Jordan*, at 1095. Regarding harmless

[5] *Apprendi*, 530 U.S. at 494 n. 19.

error analysis, the Ninth Circuit expressed uncertainty over how to proceed:

> As there is little judicial experience on this issue, *it is not perfectly clear how to analyze whether* Apprendi *error is harmless*. . . . We see two analytical options: One is that we might look only at the sentence received to see if it is greater than the maximum sentence the defendant should have faced. The other is that, instead, we might canvass the record to see whether, had the defendant been properly indicted and the jury properly instructed, we could say beyond any reasonable doubt that the defendant would have been found guilty of the more severely punishable crime.

Id. (citations omitted; italics added). The court then held that it would be impossible to determine whether error was harmless where the aggravating factor was neither pled nor proved to a jury. *Id.* at 1096-97. Although the court did not expressly find the error to be "structural," it appears to have adopted a de facto structural error analysis for Sixth Amendment errors, similar to that employed by this Court in *Sullivan v. Louisiana*. If this is the intended holding of the Ninth Circuit, that circuit stands alone.

Yet, more recent authority from the Ninth Circuit casts doubt upon whether that court intends harmless error analysis to apply to post-*Apprendi* questions. In *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005), the court, sitting en banc, decided to permit limited remands in "plain error" cases. The court noted, however, that "[a] different analysis will apply when a defendant preserves his Sixth Amendment claim by challenging the sentencing guidelines on constitutional grounds before the district court." *Ameline*, at 1078 n.1 (citing cases that permit harmless error analysis). Thus, the Ninth Circuit is inconsistent on whether it will permit harmless error analysis for such errors.

In any event, it is clear that every other circuit rejects the notion that Sixth Amendment sentencing errors are structural errors. The First Circuit, for example, recently rejected a claim that *Apprendi* error is structural error. *United States v. Antonakopoulos,* 399 F.3d 68, 80 n. 11 (1st Cir. 2005) ("plain error" case). *See also United States v. Mojica-Baez*, 229 F.3d 292, 309-10 (1st Cir. 2000) (holding that a failure to allege the precise nature of a weapon was not structural error; error did not so "interfere with such basic and fundamental constitutional protections that they go to the structure of our criminal law system").

The Second Circuit has held that *Blakely* error is subject to harmless error analysis. *United States v. Mincey*, 380 F.3d 102, 105 (2nd Cir. 2004) (per curiam), *vacated and cert. granted by Ferrell v. United States,* 125 S.Ct. 1071 (2005); *United States v. Friedman*, 300 F.3d 111, 127-28 (2nd Cir. 2002), *cert. denied*, 538 U.S. 981, 155 L. Ed. 2d 672 (2003) (*Apprendi* error).

The Third Circuit rejected the "structural error" argument in the context of a plain error analysis, holding that not all *Apprendi* error is per se prejudicial. *United States v. Vazquez*, 271 F.3d 93, 102-03 (3rd Cir. 2001).

Likewise, the Fifth Circuit has held in *United States v. Matthews*, 312 F.3d 652 (5th Cir. 2002), that *Apprendi* error is subject to harmless error analysis. Matthews received a court-imposed aggravated sentence based on a "street gang" finding. The Fifth Circuit found error in the judge, not the jury, making the finding, but the court concluded that such error was simply instructional error, and thus subject to harmless error analysis. *Matthews*, at 665. The court expressly rejected the notion that such error could never be harmless. *Id.* It found that evidence of gang involvement was "extensive, overwhelming, and essentially uncontradicted" in that case. *Id.*

The Sixth Circuit has also held that *Apprendi* error is not structural error, and thus is subject to harmless error analysis. *See United States v. Campbell*, 364 F.3d 727, 737 (6th Cir. 2004) (drug quantity), and *United States v. Copeland*, 321 F.3d 582, 603 (6th Cir. 2003) (same).

The Seventh Circuit has observed that "judicial resolution of a factual dispute that should have been presented to a jury is not a 'structural error' that requires automatic reversal" because "juries are not necessarily more accurate than judges at finding facts." *Knox v. United States*, 400 F.3d 519, 523 (7th Cir. 2005) (citing *Schriro v. Summerlin*, 542 U.S. 348 (2004)).

The Eighth Circuit has held in a number of contexts that *Apprendi* error is not structural. *United States v. Allen*, 406 F.3d 940 (8th Cir. 2005) (en banc) (failure to charge one statutory aggravating factor in capital case is not structural error); *United States v. McDonald*, 336 F.3d 734, 738 (8th Cir. 2003) (drug quantity not proved to jury is subject to harmless error analysis) (citing *United States v. Anderson*, 236 F.3d 427 (8th Cir. 2001)).

The Tenth Circuit also applies harmless error analysis to preserved *Blakely* claims. *See United States v. Riccardi*, 405 F.3d 852 (10th Cir. 2005).

The Eleventh Circuit is in accord with these other circuits. In *United States v. Rodriguez*, 406 F.3d 1261 (11th Cir. 2005), *cert. denied*, ___ S. Ct. ___, 2005 WL 483174, 73 USLW 3531 (U.S. Jun 20, 2005) (No. 04-1148), the district court judge had ruled, using reasoning similar to that of the Washington Supreme Court, that *Booker* error was a "structural" defect that precluded analysis of the facts of each case. The Court of Appeals rejected this approach, correctly noting that "none of the eleven other circuits to address *Booker* plain error issues have taken such an extreme approach." *United States v. Rodriguez*, 406 F.3d at 1263-64. The court held that

Booker error was not akin to the structural error noted in *Sullivan v. Louisiana*. *Id.*

The D.C. Circuit, too, agrees that post-*Apprendi* error is not structural. *United States v. Lafayette*, 337 F.3d 1043, 1052 (D.C. Cir. 2003).

Thus, *Recuenco* conflicts with nearly every federal circuit court of appeal Review is appropriate under Supreme Court Rule 10(b).

C. Conflict with State Appellate Courts.

At least eight state courts of last resort have applied harmless error analysis to Sixth Amendment sentencing error but there appears to be confusion in some intermediate appellate courts as to whether *Neder* is properly applied to such errors post-*Apprendi*. And now both the Washington and the North Carolina Supreme Courts have held that harmless error is impossible in post-*Apprendi* and post-*Blakely* cases.

Many state supreme courts have applied harmless error analysis. *See e.g. State v. Henderson*, 209 Ariz. 300, 100 P.3d 911 (2004) (holding that *Blakely* error in judicial findings of aggravating facts is not structural error and that "every federal circuit court has . . . been uniform in holding that *Apprendi* error can be reviewed for harmless error"); *People v. Sengpadychith*, 26 Cal. 4th 316, 109 Cal. Rptr. 2d 851, 27 P.3d 739 (2001) (gang enhancement found by judge is subject to harmless error analysis); *State v. Davis*, 255 Conn. 782, 793-94, 772 A.2d 559, 567-68 (2001) (firearm finding by judge rather than jury was harmless error); *People v. Thurow*, 203 Ill. 2d 352, 362-71, 786 N.E.2d 1019, 1025-29 (2003) (judicial finding of "household member" aggravator was harmless error—but doubts about *Neder* are discussed); *State v. Burdick*, 782 A.2d 319, 327-28 (Me. 2001) (sentencing factor depending on attempted murder victim's identity as a police officer decided by judge, not jury; court rejects "structural error" arguments in context of state court's plain error analysis); *Clark v. State*, 621 N.W.2d 576, 581 (N.D. 2001) (judicial decision on firearm aggravator was harmless error where defendant conceded possession of the firearm); *Teague v. Palmateer*, 184 Or. App. 577, 590, 57 P.3d 176, 186 (2002) (recognizing that most courts have found *Blakely* error subject to harmless error analysis and thus concluding that it is not a watershed change in the law); *State v. Gordon*, 262 Wis. 2d 380, 663 N.W. 2d 765 (2003).

In addition to the Washington Supreme Court, however, the North Carolina Supreme Court recently decided that harmless error analysis is never appropriate as to Sixth Amendment sentencing error. *See State v. Allen*, (2005 WL 1539186 at *11-17.), ___ S.E.2d ___ (N.C. 2005). The *Allen* court essentially adopted the analysis of the *Hughes* court, and held that harmless error could never be applied where the jury failed to consider a sentencing factor. *Id.* at *16.

The dissenting North Carolina justices argued at length that the majority decision jeopardized an important federal constitutional doctrine that serves as an anchor in modern appellate and criminal law jurisprudence. *Id.* at *18-20 (Martin, J., concurring in part and dissenting in part). The dissent also cogently explained the theoretical basis for harmless error analysis in this context, and illustrated the irreconcilable conflict between the majority's decision and this Court's precedents. *Id.* at *23-28. Finally, the dissenting opinion lists much of the caselaw touching on this subject in the federal and state courts. *Id.* at *28 n. 13, n. 15. Still, in the face of all these arguments, the majority held that harmless error was impossible.

Several state appellate courts also continue to express doubts about *Neder*'s vitality, or at least its application to *Blakely* error. For example, the majority opinion from the Illinois Supreme Court in *Thomas* found harmless error but

questioned whether *Neder* would be overruled. *Thurow*, 786 N.E.2d at 1025-29. *See also Thurow*, 786 N.E.2d at 1032-33 (Kilbride, J., dissenting—arguing that Sixth Amendment sentencing error can never be harmless), *Cf. Thurow*, at 1030-31 (Freeman, J., specially concurring in the opinion—finding that *Apprendi* and *Neder* can be harmonized). *See also State v. Nitz*, 353 Ill. App. 3d 978, 994-99, 820 N.E. 2d 536, 553-55 (2004) (questioning the continued vitality of *Neder*).

In another decision, an intermediate Indiana appellate court questioned the validity of *Neder* and cited to the Washington Supreme Court's *Hughes* decision as authority for the claim that *Blakely* error can never be harmless. *See Freeze v. State*, 827 N.E. 600, 604-05 (Ind. Ct. App. 2005) (discussing *Blakely* error under *Neder* and *Sullivan*).

Although the Arizona Supreme Court has applied harmless error in the *Blakely* context, *Henderson*, *supra*, Arizona appellate court judges have questioned whether *Blakely* error is structural. *See State v. Estrada*, 108 P.3d 261, 279 (Ariz. Ct. App. 2005) (Kessler, dissenting); and *State v. Resendis-Felix*, 100 P.3d 457, 461 (Ariz. Ct. App. 2004) (Eckerstrom, concurring).

Likewise, two judges on a three-judge panel of the Washington Court of Appeals held, before *Hughes* was decided, that *Blakely* error was structural. *See State v. Fero*, 125 Wash. App. 84, 104 P.3d 49 (2005).

Finally, it should be noted that the *Recuenco* decision is now the *third* Washington Supreme Court opinion holding that *Apprendi*-style error is structural error. *See State v. Thomas*, 150 Wash.2d 821, 849-50, 83 P.3d 970 (2004). Given these conflicting approaches in the state appellate courts, and given that there is a clear split of authority from two separate state courts of last resort, review by this Court is appropriate. Supreme Court Rule 10(b).

D. The Washington Supreme Court's Erroneous Interpretation of the Federal Constitution Creates a Continuing Analytical Difficulty, Not Just the Transitory Disruption Occurring in the Federal Courts on Similar Sixth Amendment Sentencing Claims.

Unlike many post-*Blakely* plain error or harmless error cases, the issues presented by the *Hughes* and *Recuenco* decisions will not abate over a short period of time. This decision precludes harmless error analysis on *any* type of instructional sentencing enhancement error, even where a jury passed on some aspect of the enhancement.

In the federal courts and in many states, post-*Blakely* or post-*Booker* cases will be processed through the appellate courts over the course of the next year or so. But states like Washington, which have authorized jury trials for aggravating factors, will continue to submit innumerable sentencing questions to juries through special verdict forms and interrogatories. Wash. Rev. Code § 9.94A.535. For instance, juries will be asked to decide whether a crime was committed with "deliberate cruelty" or against a "particularly vulnerable victim." Wash. Rev. Code § 9.94A.535(3)(a), (b). Under the *Recuenco* and *Allen* decisions, states like Washington and North Carolina will be precluded by the Federal Constitution from conducting harmless error analysis if any mistake is made in instructing the jury on these sentencing enhancements.

This continuing problem will perpetuate the anomalous results in *Recuenco* and *Allen*, whereby harmless error is possible where an *element* is wholly omitted, but impossible if a *sentencing factor* is omitted, or even just misdefined.

CONCLUSION

This Court should grant certiorari to decide this important federal question. The Washington State Supreme Court's decision is based on federal constitutional law, conflicts with this Court's decision in *Neder*, conflicts with numerous decisions of the United States Courts of Appeal, and conflicts with decisions from courts of last resort in the states. Moreover, as evidenced by the Ninth Circuit's decision in *Jordan*, and by various state appellate court decisions, a split exists over whether *Neder* harmless error analysis is appropriate post-*Apprendi* and post-*Blakely*. This issue will be a continuing problem in any jurisdiction that has maintained a mandatory guidelines system where sentencing enhancements will be decided by juries.

This case is an excellent vehicle for resolving this important federal constitutional question, as the issue was preserved below, the material facts are not in dispute, the error alleged is conceded, and the harmlessness of that error is palpable.

Review is appropriate pursuant to Supreme Court Rule 10.

Respectfully submitted,

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APPENDICES